

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET N.W., SUITE 400
WASHINGTON, D.C. 20001**

DATE: 03/27/97

CASE NO. 95-INA-91

In the Matter of:

KVL SYSTEMS, INC.
Employer

on behalf of

EDWARD SLODZIAK
Alien

Before: Holmes, Neusner and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 15, 1993, KVL Systems, Inc. ("Employer") filed an application for labor certification to enable Edward Slodziak ("Alien") to fill the position of Systems Analyst (AF 5). The job duties for the position, as initially stated on the application, were as follows:

Design, develop, customize and implement on-line technical and business applications for clients. Interface hardware and software, write program and system specifications and enhance, test, and debug systems. Software development and implementation. Utilize IBM mainframe 360, 370 and 4341 series using OS/MVS/XA (sic) and OS/VM operating systems.¹

(AF 5).

The stated job requirements for the position were as follows: a Bachelor's Degree in Computer Science or Electrical Engineering; 2 years of experience in the job offered; and Other Special Requirements, including: "Experience in COBOL, P1/1 and Assembler Programming Languages and CICS on-line system (AF 5).

In a Notice of Findings ("NOF") issued on May 3, 1994, the CO proposed to deny certification on the following grounds: 1) Employer's wage offer of \$43,368 per year is below the prevailing wage of \$53,144; 2) Employer failed to establish the availability of permanent and full-time work; 3) Employer's requirements appear excessive and restrictive; and 4) regarding the degree requirement, Employer should add Mathematics as a qualifying major (AF 49-51).

Employer submitted its rebuttal on or about June 1, 1994 (AF 52-72). Although Employer cured the deficiencies regarding the prevailing wage rate and the Mathematics major, by increasing its wage offer and adding Mathematics as a qualifying major (AF 68), the CO found the rebuttal unpersuasive regarding the remaining deficiencies and issued a Final Determination on June 13, 1994, denying certification (AF 73-76).

¹On June 1, 1994, the Employer amended the application. The listed duties are identical with those set forth in the initial application, except that the amended application deletes the last sentence thereof (Compare AF 5 and AF 68).

Under cover letter dated July 15, 1994, Employer filed a "request for review and reconsideration," together with additional documentation in support of its request (AF 77-95). Subsequently, this matter was referred to the Board of Alien Labor Certification Appeals for review.

Discussion

On review, we initially note that the CO apparently did not rule on Employer's request for reconsideration (AF 95). It is well settled that the CO is required to make such a ruling, and that failure to do so may warrant remanding the case back to the CO. *See, e.g., Richard Clarke Associates*, 90-INA-80 (May 13, 1992 (*en banc*)); *M.I.E. Corp.*, 93-INA-32 (Mar. 2, 1993); *K & S Plumbing*, 92-INA-404 (June 3, 1993)(*per curiam*).

In addition, we find that the Notice of Findings is somewhat ambiguous and appears to confuse the "employment" issue with the unduly restrictive requirements issue. In pertinent part, the CO stated:

Pursuant to 20 CFR 656.20 DEFINITIONS, "employment" means permanent full-time work by an employee for an employer other than oneself.

Pursuant to 20 CFR 656.21(b)(2) employer is required to document that his requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States and as defined for the job in the Dictionary of Occupational Titles (D.O.T.).

Employer indicates that the job opening is for the Systems Analyst and requires a Bachelor's degree in Electrical Engineering or Computer Science, 2 years experience in the job offered and Special Requirements of: experience in COBOL, P1/1 and Assembler Programming Languages and CICS on-line system. Employer's requirements appear excessive and restrictive.

In the case of the degree requirement, we would expect employer to add Mathematics as a qualifying major.

In the case of the special requirements, we note that employer filed a large number of alien certification applications with these exact special requirements, and we question whether employer has permanent and full time work, in the listed specific areas, for all of these aliens.

(AF 50).

In response to the Notice of Findings, Employer clearly sought to cure all of the cited

deficiencies. Employer amended the application, increased the wage offer to the prevailing wage rate, added Mathematics as a qualifying major (AF 68), provided a detailed letter from its President outlining the nature of its business as a data processing consulting firm with an explanation of the business necessity for the stated requirements (AF 63-66), and submitted documentation in support of his position (AF 53-62).

When the foregoing was deemed inadequate by the CO in the Final Determination, Employer requested reconsideration and submitted various additional documents in support of its position (AF 77-95).

Because the CO failed to rule on Employer's reconsideration request, the Notice of Findings was ambiguous, and Employer appears to have made a good faith effort to cure the deficiencies, we remand this matter to the CO with instructions to consider the entire record, including the new documents. If, upon reconsideration, the CO still finds the evidence insufficient, she is directed to issue a new Notice of Findings with instructions specifying the type of documentation required to cure such deficiencies. On the other hand, if the CO determines that Employer has cured all of the cited deficiencies, she should direct Employer to proceed with its recruitment efforts based on the amended application, which adds Mathematics as a qualifying major and raises the wage offer to the prevailing wage rate, to determine whether or not there are willing, qualified, and available U.S. workers.

ORDER

For the reasons stated, the denial of certification is **VACATED**, and this case is **REMANDED** to the Certifying Officer for further proceedings in accordance with this Decision.

Entered at the direction of the panel.

Todd R. Smyth, Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.